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No. 08-357

IN THE
Supreme Court of the United States

SAMUEL R. HOGSETT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITIONER'S REPLY BRIEF 1
CONCLUSION 14

TABLE OF AUTHORITIES

CASES **Page(s)**

Bui v. DiPaolo,
170 F.3d 232 (1st Cir. 1999) 7, 8, 9

Davis v. Alaska,
415 U.S. 308 (1974).....3, 4, 5, 6, 7

Delaware v. Fensterer,
474 U.S. 15 (1985).....7

Delaware v. Van Arsdall,
475 U.S. 673 (1986).....2, 4, 5

Douglas v. Alabama,
380 U.S. 415 (1965).....4, 7

Henry v. Speckard,
22 F.3d 1209 (2d Cir. 1994) 9, 10, 11

Searcy v. Jaimet,
332 F.3d 1081 (7th Cir. 2003).....10, 11

United States v. Fowler
465 F.2d 664 (D.C. Cir. 1972).....12

United States v. Sampol,
636 F.2d 621 (D.C. Cir. 1980).....11, 12

United States v. Taylor,
522 F.3d 731 (7th Cir. 2008).....1, 5, 11, 12

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PETITIONER'S REPLY BRIEF

The Court of Appeals for the Seventh Circuit concluded that Petitioner Samuel R. Hogsett's defense counsel was not permitted to cross-examine a key government witness about a potential source of pro-prosecution bias "without a good-faith belief that the [witness's] answers will be helpful to [the defendant's] case." *United States v. Taylor*, 522 F.3d 731, 736 (7th Cir. 2008). In its Brief in Opposition to

the petition for a writ of certiorari, Respondent asserts two principal arguments in support of its position that the Petition should be denied. First, Respondent contends that because "there was no . . . evidence" that government prosecutors had offered Ms. Ford a *quid pro quo* for her testimony against Mr. Hogsett, "the direct holding" of this Court's decision in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), has "no application" to Petitioner's case, and thus there was no violation of Petitioner's right to cross-examine a key witness for bias under this Court's Confrontation Clause jurisprudence. (Opp. Br. at 8; *see also id.* at 6-7.) Respondent also denies that the Seventh Circuit's determination that Petitioner had no good faith basis to raise the question of Ms. Ford's potential bias imposes a higher threshold for bias-related questioning that conflicts with the standards utilized by other appellate courts. (*Id.* at 9; *see also id.* at 10-11.) Respondent concludes that the Sixth Amendment issue that Petitioner presents is fact-intensive and speculative and therefore does not warrant this Court's review. (*Id.* at 8.)

For the reasons that follow, Petitioner respectfully disagrees. The legal issues implicated by the Seventh Circuit's decision fall squarely within, and run contrary to, this Court's Confrontation Clause jurisprudence. Accordingly, Petitioner requests that his Petition be granted, and that the parties be directed to address the merits of Petitioner's claims.

1. The Government's contention that Petitioner's Sixth Amendment claim is somehow

speculative or fact-bound and therefore inappropriate for certiorari review ignores this Court's clear precedent.

As an initial matter, the record belies the Government's contention that the Sixth Amendment issue that Mr. Hogsett presents in his Petition is an invitation for this Court to engage in a fact-intensive inquiry. (Opp. Br. at 8.) The facts pertinent to Mr. Hogsett's Petition are not in dispute. Mr. Hogsett's trial counsel established the factual predicate for his bias theory during the district court's *voir dire*. Testimony was elicited demonstrating: (1) the existence of Ms. Ford's warrants; (2) Ms. Ford's concerns regarding her employment in light of the warrants; (3) Ms. Ford's conversations with law enforcement officials about the warrants; and (4) the timing of certain law enforcement acts and omissions with respect to those warrants that benefited Ms. Ford. (Pet. at 4-5.) Mr. Hogsett's trial counsel properly sought to use these facts "to show [the jury]—or at least argue—that [Ms. Ford] acted out of fear or concern" in testifying against Mr. Hogsett. *Davis v. Alaska*, 415 U.S. 308, 311 (1974). Having established this factual predicate, Petitioner should have been permitted to cross-examine Ms. Ford about her potential pro-prosecution bias. *See id.* at 318 (the right of effective cross-examination requires that defense counsel be permitted to "make a record from which to argue [to the jury] why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial").

Respondent's further contention that Petitioner's claim is speculative (Opp. Br. at 8) cannot be

reconciled with this Court's precedent. Under *Davis v. Alaska*, it is not necessary that the Court "speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted [Mr. Hogsett's defense counsel's] line of reasoning had counsel been permitted to fully present it." 415 U.S. at 317. The constitutional issue presented by Mr. Hogsett's Petition is concrete and direct: having established the factual predicate for his proposed line of inquiry, does the Sixth Amendment provide Petitioner with the right to present to the jury his theory of bias "so that they could make an informed judgment as to the weight to place on . . . testimony" that provided "'a crucial link in the proof" the Government offered against Petitioner? *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)). As this Court explained in *Van Arsdall*, a "criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." 475 U.S. at 680. Accordingly, this Court need not and should not speculate as to how the jury would have ultimately received Mr. Hogsett's evidence in order to resolve his Sixth Amendment claim.

In addition, Mr. Hogsett's Petition most certainly presents an important legal issue that warrants this Court's review. The Seventh Circuit applied a legal standard to Mr. Hogsett's Sixth Amendment claim that eviscerated the protections of the Confrontation Clause. Under the Seventh Circuit's newly-announced standard of bias-evidence admissibility, trial judges presiding over criminal

proceedings are permitted to *voir dire* prosecution witnesses to screen the witness's responses to questions directed at exposing bias. Based on those answers, it is the trial judge, rather than the jury, who makes credibility determinations, draws inferences, and decides whether those "answers will be helpful to [the defendant's] case." *Taylor*, 522 F.3d at 736.

Under the Seventh Circuit's answer-based standard, if a prosecution witness simply denies being biased during *voir dire*, and the trial judge finds the denial credible, the trial judge may completely prevent a criminal defendant from cross-examining the witness on the topic of potential bias in front of the jury. This procedure cannot be reconciled with the mandates of the Confrontation Clause, which reserves credibility determinations for the jury as part of a criminal defendant's right to cross-examine the witnesses against him. *See Van Arsdall*, 475 U.S. at 680; *Davis*, 415 U.S. at 318. Simply put, the application of the Seventh Circuit's standard violated Mr. Hogsett's Sixth Amendment rights and threatens to violate the constitutional rights of countless other criminal defendants.

2. The Government's attempt to distinguish and marginalize *Delaware v. Van Arsdall* is unavailing. In *Van Arsdall*, "the trial court prohibited *all* inquiry into the possibility that [a government witness] would be biased as a result of the State's dismissal of his pending public drunkenness charge." 475 U.S. at 679. This Court held that the complete prohibition violated the defendant's rights under the Confrontation Clause

because it prevented questioning regarding an event "that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." *Id.* As in *Van Arsdall*, the trial court here prohibited all inquiry into the possibility that Ms. Ford might be biased as a result of the pre-trial disposition of her warrants. The jury, however, might reasonably have found that the accommodations afforded her in connection with her warrants, the timing of those accommodations, and her concern about her employment furnished her with a motive for slanting her testimony in favor of the prosecution. The trial court's ruling and the Seventh Circuit's cross-examination standard cannot survive this Court's holding in *Van Arsdall*.

Respondent appears to suggest that *Van Arsdall* does not apply here because there was "no . . . evidence of a *quid pro quo* between [Ms. Ford] and the prosecution." (Opp. Br. at 8.) As an initial matter, Mr. Hogsett has not "concede[d]" there is no evidence regarding a *quid pro quo*: substantial circumstantial evidence was adduced during *voir dire* that would have permitted the jury to infer that Ms. Ford's testimony was motivated by her perception of some type of *quid pro quo* agreement. Respondent's attempt to distinguish *Van Arsdall* on this basis ignores the fact that the witness in *Van Arsdall* "denied that the agreement had affected his testimony." 475 U.S. at 676. The existence (or not) of a *quid pro quo* and the possibility that it might have affected a witness's testimony is a matter for the jury; it is not a prerequisite to a finding of a Sixth Amendment violation. Accordingly, the trial court here constitutionally erred by removing from the

jury the opportunity to infer from specific facts that Ms. Ford's testimony was biased.

3. Respondent's reliance on *Delaware v. Fensterer*, 474 U.S. 15 (1985) (*per curiam*), is misplaced. *Fensterer* does not address witness bias, and the Court expressly noted that the case did not fall into the category of cases, like *Davis*, that involved a restriction on cross-examination. *Id.* at 19. Indeed, in *Fensterer*, the trial court did not "limit the scope or nature of defense counsel's cross-examination in any way." *Id.* Here, in contrast, the trial court completely foreclosed defense counsel's cross-examination of a key government witness on an important avenue of bias.

Moreover, *Fensterer* specifically recognizes that "the assurances of reliability [this Court's] cases have found in the right of cross-examination are fully satisfied . . .[where] the factfinder can observe the witness' demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused." *Id.* at 20; *see also, e.g.*, *Douglas*, 380 U.S. at 419 (noting that the Confrontation Clause compels a witness "'to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief'") (citation omitted). *Fensterer* thus supports the arguments set forth in Mr. Hogsett's Petition.

Respondent's reliance on the First Circuit's opinion in *Bui v. DiPaolo*, 170 F.3d 232, 242 (1st Cir. 1999), likewise is misplaced. Though *Bui* obviously is

not binding on this Court, Respondent quotes *Bui* for the proposition that "'[t]he threshold requirement imposed by the Confrontation Clause is satisfied as long as the defendant is given a fair chance to inquire into a witness's bias.'" (Opp. Br. at 7 (quoting *Bui*).) Yet the whole point of Mr. Hogsett's Petition is to remedy the fact that he was *not* given his "fair chance" to cross-examine Ms. Ford regarding possible bias.

Although the First Circuit noted that "[o]ne well-established basis for circumscribing cross-examination is a party's inability to lay a proper evidentiary foundation for the questions that he wishes to pose," there had been no evidence in the *Bui* trial court "even remotely supporting the petitioner's offer of proof." *Bui*, 170 F.3d at 243. "When the court inquired into the predicate for the offer, counsel did not cite any evidence, but replied instead that he had a good-faith basis founded on attorney-client privilege." *Id.* On appeal, however, the First Circuit concluded that the appellant's purported evidence "sa[id] nothing" about the subject or purpose of the proposed cross-examination. *Id.* at 243 n.7. In contrast, Mr. Hogsett's trial counsel did lay a proper evidentiary foundation, after which the trial judge improperly made credibility determinations and drew inferences that were the proper province of the jury.

Ultimately, *Bui* (like *Fensterer*) supports the arguments set forth in Mr. Hogsett's Petition, in part because the First Circuit's admissibility standard conflicts with the standard that the Seventh Circuit applied in Mr. Hogsett's case. In addressing

defendant Bui's Sixth Amendment claim, the court of appeals cautioned:

> We do not mean to suggest that a criminal defendant must testify in his own behalf, or alternatively, that he must arm himself with irrefutable proof before he may cross-examine witnesses about a particular bias. We do believe, however, that a defendant in such circumstances must present a satisfactory foundation for the critical elements on which his hypothesis of bias depends.

Bui, 170 F.3d at 245. The First Circuit's predicate showing for bias-related cross-examination is substantially lower than the "answers will be helpful" standard the Seventh Circuit applied in Petitioner's case. As set forth above and in Mr. Hogsett's Petition, because Mr. Hogsett's trial counsel established an evidentiary foundation for his bias theory, counsel would have been able to cross-examine Ms. Ford concerning the warrants under the standard in *Bui*.

4. There is no merit to the Government's contention that Mr. Hogsett's Sixth Amendment claim would not have been decided differently under the standard set forth in *Henry v. Speckard*, 22 F.3d 1209 (2d Cir. 1994). The Government attempts to distinguish *Henry* by arguing that "there was no factual predicate that Ford either received a benefit or perceived that she did." (Opp. Br. at 9-10.) This argument, however, is predicated on the assumption

that Ms. Ford's denials were truthful; the argument also disregards the other bias-related evidence adduced during the *voir dire* and referenced above. (Pet. at 4-5; *see also supra* at 3.) Under the Second Circuit's standard in *Henry*, the establishment of these predicate facts would have entitled Mr. Hogsett's defense counsel to cross-examine Ms. Ford regarding her warrants. *See Henry*, 22 F.3d at 1215 ("There was plainly a foundation for the proposition that she had performed baby-sitting chores."). Whether or not Ms. Ford received a benefit or perceived she received a benefit was ultimately a question for the jury to decide. As in *Henry*, "[t]he witness may well answer bias-probing questions in the negative; but the matter of whether her answers should be believed or disbelieved is within the sole province of the jury." *Id.*

Furthermore, Respondent apparently has misperceived the Petition's reference to the dissenting opinion in *Searcy v. Jaimet*, 332 F.3d 1081 (7th Cir. 2003) (Cudahy, J., dissenting) (Pet. at 18-21), arguing that Petitioner relies on the opinion to "support his argument that a defendant should be able to cross-examine a witness on a speculative theory of bias even after the trial court conducted a hearing and determined that there is no basis for the line of questioning." (Opp. Br. at 11.) In fact, Petitioner analyzed in some detail the *Searcy* dissent to illustrate the significant differences between the Second and Seventh Circuits' standards for admission of bias-related cross-examination testimony.

Judge Cudahy observed in *Searcy* that "[t]he only piece of information not fully verified [in defense counsel's evidentiary foundation] was whether, in fact, the critical information was transmitted" to the prosecution witnesses. 332 F.3d at 1094. Judge Cudahy noted that "[i]n essence, the trial judge refused Searcy his constitutional right to cross-examination simply because [the witnesses] refused to inculpate themselves on the stand" by admitting that they had been told "critical," inculpating information. *Id.* Citing *Henry*, Judge Cudahy explained that "[e]ven if cross-examination of [the witnesses] . . . had resulted in denials, cross-examination would have permitted the jury to observe [the witness'] agitated demeanor when confronted." *Id.* Judge Cudahy recognized the jury's crucial—indeed, exclusive—role in assessing witness demeanor during a cross-examination for potential bias. Like the *Searcy* majority, the Seventh Circuit here disregarded the jury's function during cross-examination in evaluating a Confrontation Clause claim.

Respondent is similarly mistaken when it asserts that the difference between the "reasonable basis" standard employed in *United States v. Sampol*, 636 F.2d 621, 658 (D.C. Cir. 1980), and the "good faith belief" standard employed here by the Seventh Circuit—that is, "[y]ou are not permitted to cross-examine a witness about a particular topic without a good-faith belief that the answers will be helpful to your case," *Taylor*, 522 F.3d at 736—appears to be a matter of semantics, not a substantively different threshold for the admission of evidence." (Opp. Br. at 10.)

Sampol involved three defendants accused of participating with a Cuban dissidents' group in a car bombing. *Sampol*, 636 F.2d at 630-31. Counsel for two of the *Sampol* defendants sought to support their claims of innocence by introducing *modus operandi* evidence through the government's testifying witness. *Id.* at 655-57. After receiving a proffer, the trial judge concluded that the proposed "evidence" was too tenuously linked to the testimony to be elicited from the witness and barred the cross-examination. *Id.* at 657-58. The Court of Appeals for the District of Columbia Circuit upheld the trial court's ruling, observing:

> [C]ounsel must have a reasonable basis for asking questions on cross examination . . . . The general rule in such situations is that "the questioner must be in possession of some facts which support a genuine belief that the witness committed the offense or the degrading act to which the questioning relates."

Id. at 658 (quoting *United States v. Fowler*, 465 F.2d 664, 666 (D.C. Cir. 1972)).

The standard of admissibility employed by the District of Columbia circuit, which focuses on facts possessed by the questioner before asking the question, thus involves a process-based analysis. The Seventh Circuit test, on the other hand, is results oriented, and looks to the usefulness of the actual answers to those questions. *Taylor*, 522 F.3d at 736.

Had the threshold utilized by the trial court in Petitioner's case been restricted to a consideration of the information adduced during the *voir dire*, rather than an assessment of the credibility of the witness in denying bias or a *quid pro quo*, the trial court would have preserved Petitioner's right to have the jury consider the demeanor of the witness in responding to the proposed line of questions. This difference therefore is not simply a "matter of semantics," as Respondent contends, but implicates core principles of this Court's Confrontation Clause jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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